IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.695 OF 1999

1. Jackie @ Sultana Ashok Daryani
   R/o.S.T. Stand Zopadpatti, Manmad,
   at present in Jail

2. Suman Arun Mahale,
   S.T. Stand Zopadpatti, Manmad ...Appellants

V/s.

State of Maharashtra,
thru' P.I. of Manmad Police Station ...Respondent

Mrs.Sharmila Kaushik, Advocate, for the Appellants.

Mrs.M.M. Deshmukh, APP, for the Respondent.

CORAM : J.N. PATEL &
A.A. SAYED, JJ.

DATE : 12TH APRIL, 2007.

ORAL JUDGMENT : [Per A.A. Sayed, J.]

1. The above Appeal is preferred against a judgment and order dated 17.11.1999 of conviction, passed by the Additional Sessions Judge, Malegaon in Sessions Case No.11 of 1996, sentencing the Appellants to life imprisonment for the offence punishable under Section 302 read with Section 34 of the Indian Penal Code and also to pay fine of Rs.1,000/- each and in default to suffer rigorous imprisonment for one month.

2. The Appellant Nos.1 and 2 in the above Appeal

were the Accused Nos.1 and 2 in the Trial Court. The Appellant No.2 Suman Arun Mahale died some time in the year 2000 in custody during the pendency of the Appeal, as evidenced by the Medical Certificate produced by the learned APP for the State. The above Appeal, in so far as Appellant No.2 is concerned, therefore abates.

3. The case of the prosecution in brief is thus - The victim Vandana Ratan Gaikwad, hereinafter referred to as "the deceased", was residing in slum area near S.T. Stand, Manmad. On 28.09.1995 the deceased was found in burnt condition in front of her hut. The deceased was residing alongwith her paramour Ratan Gaikwad (PW-2) and one minor daughter Vanita (PW-1). The deceased was carrying on the profession of prostitution. Accused Nos.1 and 2 were also in the same profession i.e. prostitution and they were residing in a hut opposite to that of the deceased. There were frequent quarrels between the deceased and Accused No.1 and 2 on account of professional rivalry.

4. On 28.09.1995 between 8.00 p.m. and 9.00 p.m. the Accused Nos.1 and 2, in furtherance of their common intention, poured kerosene on the person of the deceased and set her ablaze in front of her house. The daughter of the deceased i.e. Vanita(PW-1), who was attending a programme at the house of one Zubeda in the neighbourhood, came back to the house and found her

mother in burnt condition lying in front of the house. The deceased told her daughter, Vanita (PW1), that the Appellants/ the Accused persons had poured kerosene on her and set her on fire (1st oral dying declaration). Vanita (PW-1) thereafter went to her father Ratan (PW-2), who was working as a waiter in a hotel nearby belonging to one Balu. Ratan (PW-2) was the paramour of the deceased and father of Vanita (PW-1) and was residing alongwith the deceased. Thereafter Ratan (PW-2) and Vanita (PW-1) rushed to the house. The deceased told Ratan (PW-2) that the Accused persons had come and poured kerosene on her and set her ablaze and fled away (2nd oral dying declaration). Ratan (PW-2) then carried the deceased in a autorikshaw to the Rural Hospital, Manmad and admitted her in the said hospital in the intervening night of 28.9.1995 and 29.9.1995 at about 12:30 a.m.

5. The deceased was conscious when she was brought to the hospital. The deceased gave the history for the purposes of medical case record, stating that accused persons had poured kerosene on her person and set her on fire. One Dr.Lalchand Laxman Jadhav (PW-3), Medical Officer, Rural Hospital, Manmad, examined the deceased and also recorded the burn injuries in the medical case record and treated the deceased and also informed the police of City Police Station, Manmad. Special Executive Magistrate one Mr.Sadashiv Shivram

Shinde (PW-4) came to the hospital and recorded the dying declaration (1st recorded dying declaration) of the deceased at the Rural Hospital at Manmad. The police officer of City Police Station, Manmad, thereafter, registered an offence under Section 307 read with section 34 of the Indian Penal Code vide C.R. No.16 of 1995 on the basis of the dying declaration given by the deceased recorded by the said Special Executive Magistrate.

6. The deceased, on the advise of the Doctor at the Rural Hospital at Manmad, was shifted to the Civil Hospital, Nasik, on 30.09.1995. At the Civil Hospital at Nasik, the deceased was examined by one Dr.Haribhau Yeshwantrao Gawade (PW-5). The deceased was conscious at that time and was in a position to talk. Upon a letter of request by the police, Special Judicial Magistrate, one Arun Omkar Bhavsar (PW-6), came to the Government Hospital, Nasik and recorded the dying declaration (2nd recorded dying declaration) of the deceased at about 11 p.m. on 30.9.1995. In the meantime the investigation officer recorded the statements of the witnesses and carried out a spot panchanama and arrested the accused persons and seized the incriminating articles viz. one stove of kerosene, burnt pieces of saree and petticoat smelling of kerosene, which were sent to the Chemical Analyser. The deceased ultimately succumbed to her injuries at

the Civil Hospital at Nasik on 9.10.1995 i.e. after a period of about 11 days from the date of the incident. The inquest panchanama was carried out and the body of the deceased was sent for post mortem. Upon the death of the deceased the police altered the offence to Section 302 instead of Section 307 of the Indian Penal Code.

7. After the entire investigation, a charge-sheet came to be filed against the accused persons. The case was thereafter committed to the Court of Sessions by the Learned Judicial Magistrate First Class and the accused persons pleaded not guilty and denied the commission of any offence by them, upon a charge being framed by the Sessions Court. The plea of the accused persons, when they were examined under section 313 of Criminal Procedure Code, was that of denial of involvement and of wrongful implication in the case. They however did not produce any evidence in their defence. The prosecution examined seven witnesses in support of their case. On the basis of the available evidence, the learned Trial Judge came to the conclusion that sufficient evidence was brought on record to prove the guilt of the accused persons and proceeded to convict and sentence the accused persons - hence this Appeal.

8. We have heard the learned Counsel Mrs.Sharmila

Kaushik for the Appellant No.1 and the learned APP Mrs. M.M. Deshmukh for the State. The learned Counsel appearing on behalf of the Appellant No.1 submitted that there were no eyewitness examined by the prosecution and the case of the prosecution rests on the circumstantial evidence and the dying declarations are not reliable and that there are lot of differences and changes in the dying declarations which amount to improvement which results in clouds of doubt, particularly because there were no eye witness to the incident. The learned Counsel for the Appellant No.1 further submitted that the time of admission of the deceased in the Rural Hospital at Manmad is 12:30 a.m. on 29.9.1995 and that the incident took place at about 9.00 p.m. on 28.9.1995 and there is a huge gap between the time of the incident and admission of the deceased to the hospital and thus there is some missing chain as to where was the deceased between 9.00 p.m. to 12:30 a.m. It is further submitted that the incident occurred in front of the hut of the deceased in a slum area and that it cannot be believed that there was no eye witness to the incident. The learned Counsel further submitted that assuming that the accused persons had committed the offence, the same would fall under Exception 4 of Section 300 of the Indian Penal Code since the act was as a result of a quarrel and was not premeditated. The learned Counsel urged before us that the kerosene used, was from the stove which was

lying at the house of the deceased and, therefore, it was not as if the accused persons had carried the kerosene and it is quite probable that during the quarrel and in the heat of the moment the accused persons took kerosene from the house of the deceased and committed the offence.

9. The crucial question in this case is whether the prosecution was able to bring on record that the accused persons and none else were responsible for causing the burn injuries by setting the deceased on fire on 28.9.1995 between 8.00 p.m. and 9.00 p.m., resulting in the death of the deceased. The prosecution has mainly relied upon the four dying declarations i.e. two 'oral' dying declarations made by the deceased to her daughter Vanita (PW-1) and to her paramour Ratan (PW-2) (which have come on record in the form of examination-in-chief of PW-1 and PW-2) and two 'recorded' dying declarations made by the deceased to Mr.Sadashiv S. Shinde, the Special Executive Magistrate at Manmad (PW-4) and also to Mr.Arun O. Bhavsar, Special Judicial Magistrate at Nasik (PW-6). Thus, amongst other corroborative evidence in the present case, the two recorded dying declarations and the testimony of PW-1 and PW-2 in respect of the two oral dying declarations are the basis of the conviction of the accused persons by the Trial Court.

10. The prosecution has examined seven witnesses viz. (1) daughter of the deceased i.e. Vanita (PW-1), (2) paramour of the deceased i.e. Ratan Gaikwad (PW-2), (3) Dr.Lalchand Laxman Jadhav, Medical Officer at the Rural Hospital, Manmad (PW-3), (4) Mr.Sadashiv Shivram Shinde, Special Executive Magistrate, Rural Hospital, Manmad (PW-4), (5) Dr.Haribhau Yeshwantrao Gawade, Medical Officer, Civil Hospital, Nasik (PW-5), (6) Mr.Arun Omkar Bhavsar, Special Judicial Magistrate, Nasik (PW-6) and (7) Mr.Ramlala R. Birade, I.O., Manmad City Police Station, Manmad (PW-7).

11. Vanita (PW-1), daughter of the deceased, was the first person to come to the spot of the incident and saw the deceased in burnt condition. Vanita (PW-1) at the time of deposition was about 11 years old and she has deposed that there were quarrels between the deceased and the accused persons who were residing in front of their house. She further deposed that on the fateful day, she had gone to the house of Zubeda where there was a programme being held and when she came back to her house, she found her mother, i.e. the deceased, in burnt condition. She further deposed that her mother, the deceased, told her that the accused persons had poured kerosene on her person and she was set on fire. Vanita (PW-1) further deposed that upon hearing her mother she went to call her father who was working as a waiter in a hotel. In the cross-examination of

Vanita (PW-1), she has stated that the deceased had also informed her that on the same day as the incident also there was quarrel between the deceased and the accused persons.

12. It is pertinent to note the age of Vanita (PW-1), who is about 11 years old at the time of the deposition and was about 7 years old at the time of the incident. She is the first person to have come to the scene of the crime and deposed to the facts as mentioned above. It is highly unlikely that a witness of this age could have been tutored and she has also very innocently deposed that her mother was consuming liquor. We do not find any reason to disbelieve the evidence of this witness and find that the evidence of this 11 years old Vanita (PW-1) who is the daughter of the deceased is truthful and relevant in the facts of the case.

13. The paramour of the deceased, Ratan Gaikwad (PW-2) has deposed that his daughter (PW-1) came to his hotel at about 9:00 - 9:30 p.m. and that they rushed towards the house and saw the deceased in burnt condition. He has further deposed that the deceased told him that the accused persons had poured kerosene on her person and set her on fire and fled away. PW-2 has further deposed that about 3 - 4 days prior to the day of the incident, quarrel had taken place between

the deceased and the accused persons. It is further recorded that PW-2 carried the deceased in an autorikshaw in the Rural Hospital at Manmad, and thereafter on 30.09.1995 took her to the Civil Hospital at Nasik, where she expired after few days. In the cross-examination, the PW-2 has deposed that he carried the deceased to the Rural Hospital at Manmad around 10:00 - 10:30 p.m. and that his wife was in a position to speak. He has further deposed that she was lying alone on the street and nobody was there, as the people from the mohalla had gathered in the house of one Zubeda.

14. Dr.Lalchand Jadhav (PW-3) who was Medical Officer at the Rural Hospital at Manmad has deposed that the deceased was admitted to the hospital at 12:30 a.m. on 29.9.1995 and that the deceased gave medical history stating that the accused persons poured kerosene on her and she was set on fire and that the deceased was brought to the hospital by Ratan Gaikwad (PW-2). PW-3 has further deposed that the deceased was conscious when she was brought to the hospital and that he treated the deceased and informed the police and that the Special Executive Magistrate had recorded the statement of the deceased. In his cross-examination, PW-3 has stated that he noticed about 50% burn injuries on the deceased and that her face and neck and hands had burn injuries and that the Magistrate has recorded

the statement of the deceased and PW-3 has denied that the deceased was not in a position to talk at the time when she was brought to the hospital. The medical case record submitted by PW-3 also shows that the patient was conscious and records the incident of burning by pouring kerosene on her body by the accused persons and that the deceased was brought to the hospital by Ratan Gaikwad (PW-2) and the burn injuries and treatment were also recorded in the medical case record produced by PW-3.

15. Mr.Sadashiv S. Shinde (PW-4), who is the Special Executive Magistrate and who has recorded the dying declaration of the deceased (Exhibit - 35) at the Rural Hospital at Manmad, has deposed that the dying declaration was recorded by him at about 1 a.m. on 29.09.1995 and that the deceased was in a position to speak and give her statement and that the endorsement of the Doctor on the statement of the deceased was also obtained by him as also the thumb impression of the deceased and that he has also signed the said statement. In the cross-examination, PW-4 has denied that the deceased was not in a position to talk.

16. Dr.Haribhau Yeshwant Gawade (PW-5), who is the Medical Officer in the Civil Hospital at Nasik, where the deceased was shifted, has deposed that he examined the deceased at about 11:05 p.m. on 30.09.1995 and at

that time the patient was conscious and was in a position to talk and he has made an endorsement to that effect in the dying declaration and that the Magistrate (PW-6) recorded the dying declaration. He has further deposed that he examined the deceased again at 11:35 p.m. and put the endorsement again that the patient is conscious and able to speak.

17. PW-6, Arun O. Bhavsar, Special Judicial Magistrate, who recorded the dying declaration of the deceased on 30.09.1995 (Exhibit - 47) at the Civil Hospital at Nasik, has deposed that he came to the Civil Hospital at the written request of the police that the dying declaration of one woman with burn injuries was required to be recorded. He has deposed that he asked the Doctor-in-charge, Dr.Gawade (PW-5), to certify whether the deceased was in a position to speak and that the said Doctor examined the deceased and certified that the deceased was in a position to give a statement and he accordingly recorded the statement at about 11:00 p.m. on 30.09.1995. PW-6 has further deposed that the deceased gave all relevant information and also narrated the facts of the incident and he accordingly recorded her statement which was read over and explained to her and the right hand thumb impression of the deceased was obtained by him and he attested her signature. PW-6 has further deposed that thereafter he again called Dr.Gawade (PW-5) and

requested him to examine the patient once again and certify that the patient is conscious and able to speak which was accordingly done by Dr.Gawade (PW-5) and the said Dr.Gawade (PW-5) again put his signature below his own signature. We have taken note of the fact that PW-6, Mr. Arun O. Bhavsar, Special Judicial Magistrate has requested the Doctor (PW-5) to make an endorsement on the dying declaration with regard to the condition of the victim not only before, but also after the recording of the dying declaration.

18. Investigating Officer, Shri.Ramlala R. Birade (PW-7), in the case, attached to Manmad City Police Station has deposed that he carried out spot panchanama and seized the articles viz. stove of kerosene, burnt pieces of saree and petticoat smelling of kerosene, which were sent to the Chemical Analyser and he arrested the accused persons and recorded the statements of the relevant witnesses. After the deceased died, inquest panchanama was carried out by the police constable on duty at Civil Hospital at Nasik and the post mortem report and the inquest panchanama was received by them and the charge sheet was filed by him in Court.

19. It would be relevant at this stage to examine the expression "dying declaration" and relevant provisions of Indian Evidence Act, 1872 (IEA for

short). Section 59 and 60 of IEA provides as under:

> "59. Proof of facts by oral evidence-All facts, except the contents of documents or electronic records, may be proved by oral evidence.
>
> "60. Oral evidence must be direct-Oral evidence, must in all cases whatever, be direct, that is to say- If it refers to a fact which could be heard, it must be the evidence of a witness who says he saw it; if it refers to a fact which could be heard, it must be the evidence of a witness who says he heard it; if it refers to a fact which could be perceived by any other sense or in any other manner, it must be the evidence of a witness who says he perceived it by that sense or in that manner; if it refers to an opinion or to the grounds on which that opinion is held, it must be the evidence of the person who holds that opinion on those grounds:
>
> Provided....."

20. Thus, the general rule is that all oral evidence must be direct and not hearsay. However, there are certain exceptions to this general rule, which are enumerated in Section 32 of the IEA. Section 32 of IEA deals with statement by persons who cannot be called as witnesses and reads as under:

> "**32. Cases in which statement of relevant fact by person who is dead or cannot be found, etc., is relevant--**Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which, under the circumstances of the case, appears to the Court unreasonable, are themselves relevant facts in the following cases:
>
> **(1). When it realtes to cause of death--**When the statement is made by a

> person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question.
>
> . Such statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question.
>
> **(2)** _____
> **(3)** _____
> **(4)** _____
> **(5)** _____
> **(6)** _____
> **(7)** _____
> **(8)** _____."

. Clause (1) of Section 32 is thus relevant for our purposes, which clause generally is described as the "dying declaration" though such expression has not been used in the statute. Dying declaration essentially means statements made by persons as to the cause of his death or as to the circumstances of the transaction resulting in his death.

21. The principle on which dying declaration is admitted in evidence is indicated in the legal maxim "nemo moriturus praesumitur mentire - a man will not meet his Maker with a lie in his mouth". As held in a catena of judgments of the Hon'ble Apex Court, the grounds of admission with regard to dying declaration are firstly the necessity for victim being generally

the only principle witness to the crime, the exclusion of the statement might deflect the ends of justice and secondly, the sense of impending death, which creates a sanction equal to the obligation of an oath. The general principle on which this species of evidence is admitted is that they are declarations made in extremity, when the party is at the point of de*ath an*d every hope of this world is gone, when every motive to falsehood is silenced and the mind is induced by the most powerful considerations to speak the truth, a situation so solemn and so lawful is considered by the law as creating an obligation equal to that which is imposed by positive oath administered in a Court of Justice. The situation in which a person is *on the deathbed is so solemn and serene when he is dying that the grave position in which he is placed, is the reason in law to accept veracity of his statement. It is for this reason that the requirements of oath and cross-examination are dispensed with. Besides, should the dying declaration be excluded, it will result in miscarriage of justice because the victim being generally the only eyewitness in a serious crime, the exclusion of the statement would leave the court without a scrap of evidence.*

22. It has been further held that though a dying declaration is entitled to great weight, it is worthwhile to note that the accused has no power of

cross-examination. Such a power is essential for eliciting the truth as an obligation of oath could be. This is the reason the court also insists that the dying declaration should be of such a nature as to inspire full confidence of the court in its correctness. The court has to be on guard that the statement of the deceased was not as a result of either tutoring, or prompting or a product of imagination. The court must be further satisfied that the deceased was in a fit state of mind after a clear opportunity to observe and identify the assailant. Once the court is satisfied that the declaration was true and voluntary, undoubtedly, it can base its conviction without any further corroboration. It cannot be laid down as an absolute rule of law that the dying declaration cannot form the sole basis of conviction unless it is corroborated. The rule requiring corroboration is merely a rule of prudence.

23. *The Hon'ble Supreme Court has laid down in several judgments the principles governing dying declaration, which could be summed up as under, as indicated in Paniben V. State of Gujarat [(1992) 2 SCC 474]:-*

> *(i) There is neither rule or law nor of prudence that dying declaration cannot be acted upon without corroboration.*

(ii) If the Court is satisfied that the dying declaration is true and voluntary it can base conviction on it, without corroboration.

(iii) The Court has to scrutinise the dying declaration carefully and must ensure that the declaration is not the result of tutoring, prompting or imagination. The deceased had an opportunity to observe and identify the assailants and was in a fit state to make the declaration.

(iv) Where dying declaration is suspicious, it should not be acted upon without corroborative evidence.

(v) Where the deceased was unconscious and could never make any dying declaration the evidence with regard to it is to be rejected.

(vi) A dying declaration which suffers from infirmity cannot form the basis of conviction.

(vii) Merely because a dying declaration does not contain the details as to the occurrence, it is not to be rejected.

(viii) Equally, merely because it is a brief statement, it is not to be discarded. On the contrary, the shortness of the statement itself guarantees truth.

(ix) Normally the Court in order to satisfy whether deceased was in a fit mental condition to make the dying declaration look up to the medical opinion. But where the eyewitness said that the deceased was in a fit and conscious state to make the dying declaration, the medical opinion cannot prevail

(x) Where the prosecution version differs from the version as given in the dying declaration, the said declaration cannot be acted upon.

(xi) Where there are more than one statement in the nature of dying declaration, one first in point of time must be preferred. Of course, if the plurality of dying declaration could be held to be trustworthy and reliable, it has to be accepted.

24. These, well settled principles have been recognised and reiterated by the Hon'ble Apex Court in Uka Ram V/s. State of Rajasthan, [(2001) 5 SCC 254],

Laxman V/s. State of Maharashtra [(2002) 6 SCC 710], P.V. Radhakrishnan v/s. State of Karnataka [(2003) SCC 443], State of Maharashtra V/s. Sanjay [(2004) 13 SCC 314] and Muthu Kutty V/s. State [(2005) 9 SCC 113].

25. In the light of the guidelines set out by the Hon'ble Supreme Court and the evidence adduced, we have considered the reliability of the dying declarations of the deceased in the instant case. In the present case we find that in both the recorded dying declarations, the Magistrates who have been examined have satisfied themselves before recording dying declaration that the deceased was in a position to give the statement. There is no reason or material on record to show that the dying declarations were the product of imagination, tutoring or prompting and we find that the dying declarations are made by the deceased voluntarily and same are trustworthy and have credibility.

26. The materials on record clearly establish that the deceased was in a mentally fit condition. There is nothing on record to indicate that the witnesses were interested and falsely involving the accused persons in the crime. There is no reason to disbelieve the evidence of the two Doctors, who have deposed that the deceased was concious and able to speak and the evidence of the Special Executive Magistrate and

Special Judicial Magistrate, who have recorded the dying declarations and the said dying declarations are duly proved.

27. Reliance is placed by the Ld. APP on Khushal Rao v/s. State of Bombay AIR 1958 SCC 22 wherein, the Hon'ble Apex Court has held almost half a century ago that once the Court comes to the conclusion that the dying declaration was a truthful version as to the circumstances of the death and the assailants of the victim, there is no question of further corroboration. In the instant case also we find that notwithstanding the other pieces of evidence which support and corroborate the dying declarations as discussed hereinabove, the dying declarations are consistent, voluntary and truthful and inspire confidence and can form the basis of conviction independently even without considering other evidence.

28. In so far as the contention of the Learned Counsel for the Appellant no. 1 that there are lot of changes and improvements in the dying declaration and, therefore, not reliable, we do not agree with the said submission and find that the dying declarations are consistent and truthful and completely reliable pieces of evidence and leave no manner of doubt about their varacity and reliability and point to the complicity of the accused persons to the crime. It cannot be that

any two declarations recorded at different times can be ad verbatim. So long as there are no significant changes in the two dying declarations which materially affect the account of cause of death or the circumstances of the transaction resulting in death, the dying declarations cannot be discarded. In the present case we find that there are no material or significant changes in the two recorded dying declarations which in any way, alters the account of the cause of death of the deceased or the circumstances of transaction resulting in the death of the deceased. There are no discrepencies or infirmities, and the dying declarations are voluntary and truthful. Thus, the contention of the learned Counsel for the Appellant no. 1 that there are changes and improvements in the dying declarations which raises clouds of doubt is required to be rejected and is accordingly rejected.

29. As regards the contention of the learned Counsel for the Appellant no. 1 that there is a missing chain between 9.00 p.m. to 12:30 a.m. as to where was the deceased, we find that Ratan Gaikwad (PW-2) has deposed in his evidence that after his daughter Vanita (PW-1) came to the hotel at about 9:30 - 9:45 p.m. he rushed to the house and thereafter carried the deceased to the hospital at about 10:00 - 10:30 p.m. We do not find that there is any missing link in the chain of circumstances that would lead us

to disbelieve the sequence of events which transpired on the fateful night looking to the entire evidence. It is urged before us that it is highly unlikely that there was no eye witness in the present case. We, however, find that it has come on record in the dying declarations and the deposition of Vanita (PW-1) as well as Ratan (PW-2) that at the relevant time there was a programme in the house of one Zubeda who was residing in the neighbourhood and therefore the neighbours had gone there and we find that the evidence in this regard cannot be discarded or disbelieved and we further note that the accused persons have taken advantage of this fact and used this as an opportunity to commit the crime.

30. The learned Counsel for Appellant No.1 has lastly and in the alternative contended that assuming that the accused persons have committed the offence, the offence would fall under Exception 4 of Section 300 of the Indian Penal Code which provides that culpable homicide is not murder if it is committed without premeditation, in a sudden fight in the heat of passion upon a sudden quarrel and without the offenders having taken undue advantage or acted in a cruel or unusual manner. Therefore, the punishment applicable would be under Section 304 Part II of the Indian Penal Code which provides for a maximum of 10 years imprisonment, which the Appellant No.1 has already undergone and,

therefore, Appellant No.1 can be set free. We find no merit in the above contention. There were frequent quarrels between the deceased and the accused persons on account of professional rivalry between them and they were on inimical terms. In the 2nd recorded dying declaration, it is stated that the accused persons had a grievance that deceased had solicited and taken away the customers who came to the accused persons and therefore the accused persons had a grudge against the deceased and had frequent quarrels with the deceased. We find that the offence committed was premeditated and there was sufficient motive in the instant case more particularly because the deceased and the accused persons were staying opposite each other in close proximity and were in the same profession. The accused persons had full knowledge and intention that their act would cause the death of the deceased. There was common intention to commit offence between the accused persons and therefore, Section 34 of the Indian Penal Code is also attracted in the present case. The accused persons were fully aware that kerosene, which is an essential commodity for the purposes of cooking in the lower strata of our society, was available in the hut of the deceased as they were staying just opposite the hut of the deceased. To fall under Exception 4, all the below mentioned ingredients are required to be present when death is caused viz. (a) without pre-meditation (b) in a sudden fight (c)

without offenders having taken undue advantage or acted in a cruel or unusual manner; and (d) the fight must have been with the person killed. We find, looking to the gruesome act, that the accused persons have taken undue advantage and acted in a cruel and unusual manner and therefore, in any event, the benefit of Exception 4 to Section 300 cannot be given to them assuming for a moment that the fight was sudden and the offence was not pre-meditated.

31. The C.A. report for results of test for detection of kerosene on the seized articles viz. burnt pieces of green and black coloured printed saree and petticoat were positive and the liquid in the stove has been identified as kerosene. In the post mortem report it is stated that the opinion of the Doctor as to the probable cause of death is Oligemic shock due to extensive superficial burns 72%. Pertinently, no case is brought out in the cross-examination to discredit the witnesses and no significant suggestions were put in the cross-examination except a faint suggestion in the cross examination of IO (PW-7), that under the influence of liquor the deceased set herself on fire. Even in the statements under Section 313 of the Criminal Procedure Code, except for denial and false implications, nothing is stated to discredit the dying declarations and/or disbelieve the witnesses and/or explain the circumstances appearing in the evidence

against the accused persons.

32. In the circumstances, we find that the motive has been established by the prosecution for both the accused persons to commit the crime and we agree with the findings of the Trial Court in that regard. The witnesses have not been cross examined with regard to contentions raised before us and no explanations have been called from the witnesses. The medical evidence corroborates the prosecution case and lends support to the dying declarations. The prosecution has, thus, succesfully established the circumstances to connect the accused persons to the crime. In view of the above discussion and appraisal and analysis of evidence on record, we have no hesitation to hold that the prosecution has succesfully established all the circumstances appearing in the evidence against the accused persons by clear cogent and reliable evidence and the chain of establishing circumstances is complete and the same conclusively establishes that the accused persons alone committed the crime of murdering the deceased on the fateful day in the manner suggested by the prosecution. All the established circumstances are consistent only with the hypothesis that it was the accused persons alone who committed the crime and circumstances are inconsistent with any hypothesis other than their guilt.

33. For the reasons mentioned aforesaid, we see no reason to differ, and are of the view that the learned Trial Judge has not committed any error in passing the impugned judgment of conviction and sentence. In result, the Appeal is dismissed.

[J.N. PATEL, J.]

[A.A. SAYED, J.]